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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re FACEBOOK BIOMETRIC
INFORMATION PRIVACY LITIGATION

This Document Relates To:

ALL ACTIONS.

FREDERICK W. GULLEN, Individually and
on Behalf of All Others Similarly Situated,

Plaintiff,

vs.

FACEBOOK, INC.,

Defendant.

) Master File No. 3:15-cv-03747-JD

) PLAINTIFFS' ADMINISTRATIVE
) MOTION TO SUMMARILY DENY OR
) CONTINUE FACEBOOK, INC.'S MOTION
) FOR SUMMARY JUDGMENT FILED IN
) VIOLATION OF THE COURT'S RULE 16
) SCHEDULING ORDER

) Case No. 3:16-cv-00937-JD

I. INTRODUCTION

Pursuant to Rules 16 and 56 of the Federal Rules of Civil Procedure, Civil Local Rule 7-11 and this Court's Standing Order for Civil Cases, Plaintiffs¹ hereby move to summarily deny or continue Defendant Facebook, Inc.'s ("Facebook") December 8, 2017 Motion for Summary Judgment Based on Illinois' Extraterritoriality Doctrine and the Dormant Commerce Clause (ECF No. 257) ("Facebook's Motion"). Facebook's Motion is premature and in violation of the Court's September 11, 2017 Amended Scheduling Order (ECF No. 223) ("Amended Scheduling Order"), as it relies directly and substantially on highly technical evidence concerning the inner-workings of Facebook's facial recognition process that will be the subject of forthcoming expert discovery, and yet Facebook filed its motion before such expert discovery has even begun and more than three months before the date designated for the filing of summary judgment. *Id.* Facebook's Motion is also futile as it appears to seek relief on the basis of an affirmative defense that it has not pleaded and therefore waived. Accordingly, and as detailed below, Facebook's Motion should be summarily denied or continued until after the close of expert discovery, such that the Court and parties can address all summary judgment grounds at once on a complete evidentiary record.²

II. ARGUMENT

A. Plaintiffs' Response to Facebook's Motion Requires the Completion of Expert Analysis Contemplated by the September 11, 2017 Amended Scheduling Order

Facebook's Motion rests on complex disputed facts requiring expert discovery that has not even begun. Despite the Court's clear Amended Scheduling Order and admonitions against chaotic summary judgment proceedings, on December 8, 2017, Facebook's Motion leapfrogged expert discovery, seeking judgment on issues that are clearly the subject of expert analysis and opinion. Indeed, Facebook's Motion purports to assert undisputed facts regarding the very subjects on which experts are expected to opine. *See, e.g.*, Facebook's Motion at 4-5 (raising disputed facts concerning

¹ "Plaintiffs" refers to Nimesh Patel, Adam Pezen, Carlo Licata and Frederick William Gullen.

² Here, Plaintiffs address the plain procedural impropriety of Facebook's Motion. In due course, Plaintiffs will make a full showing under Rule 56(d) and, if need be, address the many substantive deficiencies in Facebook's premature motion.

the processes of face detection, alignment and classification as component parts of facial recognition and collection of biometric data from photos). *Cf.* Standing Order For Civil Cases Before Judge James Donato, at ¶21 (“Summary judgment motions that involve disputed material facts will usually be denied promptly in a short order.”). These purported factual conclusions about the performance of Facebook’s facial recognition technology are based on the declarations of Omry Yadan and deposition testimony of Yaniv Taigman that is the subject of expert analysis. *See* Facebook’s Motion at 10. The parties’ experts still have yet to serve expert reports pursuant to Rule 26 of the Federal Rules of Civil Procedure, and no expert depositions have been taken. In other words, if Facebook’s Motion is allowed to proceed at this time, both sides’ experts will still be submitting reports and testifying about precisely the same technical issues that underlie Facebook’s present motion *long after that motion has been fully briefed*. That is palpably unworkable. Until Plaintiffs are afforded an opportunity for full expert discovery, summary judgment is plainly unwarranted under Rule 56(d). *See Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773-74 (9th Cir. 2003) (“the Supreme Court has restated the rule as requiring, rather than merely permitting, discovery ‘where the non-moving party has not had the opportunity to discover information that is essential to its opposition’”; thus, where summary judgment is filed “early” a “continuance . . . for purposes of discovery should be granted almost as a matter of course”) (citations omitted).

B. Facebook’s Motion Is Wildly Premature and in Direct Contravention of the September 11, 2017 Amended Scheduling Order

On August 31, 2017, the parties filed their respective and competing proposals for the scheduling of the remainder of the litigation. *See* Joint Case Management Statement (ECF No. 218) (“Joint Statement”). Defendant Facebook advocated sequencing summary judgment after class certification and expert discovery. *See* Joint Statement at 3 (“expert discovery should be completed before [summary judgment] motions are filed”). On September 7, 2017, the Court held a case management conference, during which it made clear to the parties that the Court would not consider summary judgment motions before expert discovery:

1 Court: There's going to be close of fact discovery. There's going to be close
 2 of expert discovery. ***Then you're going to do all of your motions after that. . . .***
 Otherwise, it's too chaotic.³

3 On September 11, 2017, the Court entered the Amended Scheduling Order reflecting the same and
 4 setting the date of March 16, 2018 for summary judgment motions:

5 Expert Disclosures: December 22, 2017

6 Rebuttal Expert Disclosures: February 2, 2018

7 Close of Expert Discovery: March 2, 2018

8 Dispositive and *Daubert* motions: March 16, 2018

9 Amended Scheduling Order.⁴

10 Not only is Facebook's Motion in violation of the Amended Scheduling Order, it was filed
 11 without notice to Plaintiffs, without meet and confer and makes no attempt to show the good cause
 12 necessary to amend the Amended Scheduling Order under Rule 16. *See Johnson v. Mammoth*
 13 *Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992). Nor could it. The Court already considered and
 14 rejected the prospect of summary judgment motions before expert discovery. Sept. 7 Transcript at
 15 19:17-21. Facebook also boldly asserts that it will file yet ***another*** summary judgment motion at the
 16 close of expert discovery (Facebook's Motion at 1) exactly the "chaotic" approach to summary
 17 judgment the Court admonished the parties it would not do.

18 **C. Facebook's Motion Is Grounded in an Affirmative Defense It Did Not**
 19 **Plead and Therefore Waived**

20 Facebook's Motion is also futile. Its primary ground is extraterritoriality – an affirmative
 21 defense which its Amended Answer, filed nearly one year ago, did not plead. *See generally*

22 ³ Sept. 7, 2017 Transcript of Proceedings at 19:17-21 (ECF No. 222) ("Sept. 7 Transcript")
 (emphasis added).

23 ⁴ *See also* Facebook's September 22, 2017 Administrative Motion to Amend the Scheduling Order
 24 (ECF No. 224) at 1 (Facebook reiterating position that "dispositive motions be set . . . after the
 25 completion of expert discovery" and that "'expert discovery should be completed before'" any such
 26 "motions is filed" because to allow summary judgment before expert discovery would be "'both
 27 unfair and unworkable'" and "would effectively prevent the parties from filing *Daubert* motions in
 28 connection with either seeking or opposing . . . summary judgment . . . which would almost certainly
 rely on expert opinion testimony"); Facebook's September 27, 2017 Reply in Support of its
 Administrative Motion to Amend Scheduling Order (ECF No. 226) at 1 (Facebook reiterating its
 position that "'expert discovery should be completed before . . . summary judgment[] motions are
 filed'").

Defendant Facebook, Inc.’s Amended Answer and Affirmative Defenses to Plaintiffs’ Complaint (ECF No. 169) (“Amended Answer”). Facebook’s Motion argues that even “[i]f Facebook’s use of facial-recognition technology *did* violate BIPA, that alleged violation took place *outside* Illinois.” Facebook’s Motion at 1 (some emphasis in original); *H.R.R. Zimmerman Co. v. Tecumseh Prods. Co.*, No. 99 C 5437, 2002 U.S. Dist. LEXIS 16911 (N.D. Ill. Sept. 5, 2002) (extraterritoriality under Illinois law is an affirmative defense). Because Facebook has failed to plead this affirmative defense in its Amended Answer, it is waived. *See, e.g., Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005) (a party “is required to raise every defense in its first responsive pleading, and defenses not so raised are deemed waived”) (citing Fed. R. Civ. P. 8(c), 12(b), 12(g)). This fact is undisputed and summary denial is warranted.

III. CONCLUSION

Because Facebook’s Motion violates the Amended Scheduling Order, fails to seek amendment of the same and seeks relief on an affirmative defense it did not plead, Plaintiffs respectfully request that Facebook’s Motion be summarily denied or continued until expert discovery is complete.

DATED: December 13, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2017, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 13, 2017.

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